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# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1941**

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## No.——, Original

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**REPLY BRIEF TO OPPOSITION FILED BY DEFENDANTS CLAUDE CUMMINS, ET ALS., AND DEFENDANT ABRAHAM L. SHUSHAN.**

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STATE OF LOUISIANA,

*Plaintiff,*

*vs.*

CLAUDE CUMMINS, ET ALS.,

*Defendant.*

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*May It Please the Court:*

### STATEMENT.

At the last term, the State of Louisiana moved this Honorable Court for leave to file a complaint within its original jurisdiction, as She is entitled to do according to Article III, Section 2 of the Constitution of the United States. Attached to the motion was the bill of complaint the State proposed to file. This complaint, a bill in equity, disclosed as the gravamen of the suit, that the defendants, certain foreign corporations not authorized to do business

in Louisiana, and the directors of such corporations, citizens of states other than Louisiana, by agreeing to pay and paying a bribe of at least One Hundred Thirty Thousand Dollars ($130,000.00) to the President of the Board of Levee Commissioners of the Orleans Levee District (Levee Board), a governmental agency of the State of Louisiana, secured for a "dumy" Louisiana corporation (since dissolved) through which they operated, a fraudulent and illegal contract for public works with the Board. As a result of this contract, the defendants illegally received some Nine Hundred Four Thousand Four Hundred Fifty-Six Dollars and Forty-Two Cents ($904.456.42) of the public moneys of the State of Louisiana. The bill, joining the President of the Levee Board (Abraham L. Shushan, a citizen of Louisiana) as a defendant, but inviting the Court to strike him if it found that his presence would defeat this Court's original jurisdiction, asks that this Court exercise its equity powers to declare the contract fraudulent and to set it aside, and order the restitution of the money illegally had and received under such contract. The prayer of the bill prays for relief in many alternatives based upon quasi-contract, unjust enrichment, constructive trust and tort, prays for a declaration of the nullity of the contract, for an accounting and a discovery and for the appointment of a Master.

Upon the filing of the motion and the complaint, this Court issued a rule on June 9, 1941, ordering the defendants to show cause why the complaint of the State of Louisiana should not be filed. The defendant corporations and defendants Birch and Cummins filed one return, while the defendant Shushan filed a separate return, setting up substantially the same grounds of opposition. Essentially, the oppositions to the motion of the State of Louisiana

to file the complaint are based upon the following grounds:—

1. Defendants urge that the State of Louisiana is not properly a party to this suit.

2. Defendants urge that simply by bribing a state official they have defeated successfully the Constitutional right of the State of Louisiana to sue them civilly in the United States Supreme Court, and have by their own wrong ousted this Court from jurisdiction.

3. Defendants invite the Supreme Court to ignore the Constitutional guaranty to the States of a right to proceed originally in the Supreme Court.

## I. THE STATE OF LOUISIANA IS PROPERLY THE COMPLAINANT.

The first ground upon which the motion of the State of Louisiana is opposed is, as stated in the brief filed on behalf of Cummins, Birch and the corporations, that:

> "The Court would be without original jurisdiction because the cause of action, if any, asserted in the proposed complaint is vested in the Board of Levee Commissioners of the Orleans Levee District, which is a political corporation and legal entity entirely distinct from the state."[1]

It is abundantly clear, both on reason and authority, that the Orleans Levee Board is *not* "a legal entity entirely distinct from the state". When this contention was pre-

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[1]See *Cummins Brief*, p. 5. Objection 1a filed by defendant Shushan is substantially the same, and raises the same questions. See *Shushan Brief* p. 3. They will be treated together.

viously advanced, the Louisiana Supreme Court had the following to say[2]:

> "Plaintiff's counsel have not favored us with an argument in support of this fourth objection, and it is doubtless because they shrank from the task of attempting to prove that a "levee District" created by the State as one of its functionaries charged with the duty of providing for the general welfare of the people by protecting them from inundation could, by any reasoning, be considered an association or corporation distinct from, and independent of, the State . . ."

The jurisprudence on this point has been uniform ever since.[3] The Supreme Court of the United States has clearly recognized the subordinate governmental character of Levee Boards and levee districts. In *Little v. Williams*,[4] this Court said:

> "The [Levee] district was a mere political subdivision of the State, created by the latter . . . . It was essentially a subordinate agency of the State

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[2]*Fisher v. Steele*, 39 La. Ann. 447 (1887) at p. 452,453. Dart's Louisiana General Statutes § 6869.4 provides that "All levee districts in the state of Louisiana heretofore or hereafter created, are hereby declared to be political subdivisions and agencies of the state of Louisiana, and such levee districts and the boards of commissioners thereof were created and exist and hold and enjoy lands and all rights to said lands, property and property rights in furtherance of a public purpose, and this statute is enacted as an exercise of the state's reserved police power. [La. Acts 1938, No. 76, § 1.]."

[3]*State v. Grace*, 161 La. 1038 at 1044, 109 So. 830 (1926) *State v. Capderveille*, 142 La. 11, 76 So. 327 (1917); *Atchafalaya Land Co. v. Grace*, 143 La. 637, 79 So. 173 (1918); *Atchafalaya Land Co. v. Dibert Cypress Co.* 157 La. 689,102 So. 871 (1925); *Atchafalaya Land Co. v. Williams Cypress Co.*, 146 La. 1047, 84 So. 351 (1920); *Little v. Williams*, 231 U. S. 335,34 S. Ct. 68, 58 L. Ed. 256 (1913).

[4]*Little v. Williams* 231 U. S. 335, 34 S. Ct. 68, 58 L. Ed. 256 (1913). The emphasis is added.

> for its convenience, *and can have no will contrary to the will of the State*, held its property and revenue for public purposes, *and was in all respects subject to the State's paramount authority.*"

As the Levee Board here involved is so clearly "a mere political subdivision of the State," exercising state functions, performing state duties and expending state funds, which merely because they are administered by a levee board "do not cease to be the monies of the State,"[5] it should seem obvious that the state can itself, concurrently and independently, assume the performance of the same state functions and duties, including the function of instituting and maintaining a suit for the protection of its monies. Yet, the defendants contend that the Law of Louisiana precludes the State from asserting a cause of action "arising from board affairs," and insist that the right to assert such a claim is exclusively the property of the Levee Board.[6] But this position is untenable.

The authority for the State of Louisiana to bring this suit, and the basis upon which it asserts this cause of action as one inuring to itself in its sovereign and proprietary capicity, is two fold:[7] —

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[5]See *Fisher v. Steele*, 39 La. Ann. 447,453 (1887). See also *State v. Grace*, 161 La. 1039, 109 So. 830 (1926) where the court says at 161 La. p. 1044; "The state, should it transfer the land to the [levee] district, including the mineral rights, . . . would not be parting with the property within the meaning of the constitutional section cited, but would only be placing it under the control of one its agencies for the purpose of constructing and maintaining levees. The land would, to all practical intents and purposes, still be the property of the state."

[6]See *Cummins Brief*, p. 6; *Shushan Brief*, p. 4.

[7]It is for these reasons that Article I of the Bill of Complaint states that it is "brought by and on behalf of the State of Louisiana through its Attorney General, Eugene Stanley, and through its Commission created by Act 13 of the Louisiana Legislature of 1940, represented by its Executive Counsel and Special Assistant Attorney General, James J. Morrison.

1. As an assertion and protection of the rights and interests of the State by the Attorney General as authorized by, and conformable to the duties imposed on him by, Article VII, Section 56 of the Constitution of Louisiana.

2. As an exercise of the police power and a valid re-assertion of concurrent authority, previously delegated by the principal (State of Louisiana) to the agent (Levee Board), to sue under Act 13 of 1940.[8]

## 1. THE AUTHORITY OF THE ATTORNEY GENERAL TO SUE ON BEHALF OF THE STATE.

Defendants rely for their contention that the State cannot sue upon a cause of action "arising out of board affairs," and that therefore this Court is without original jurisdiction, on three Louisiana Cases[9] and one case in this Court.[10] But none of these cases control the right of the State of Louisiana to assert the cause of action in the proposed complaint. They will be considered seriatim.

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[8]Commonly referred to as the "Crime Commission Act."

[9]*State v. Tensas Delta Land Co.*, 126 La. 59, 52 So. 216 (1910); *State v. Standard Oil Company*, 164 La. 334,113 So. 867 (1927); and *Saint v. Allen*, 172 La. 359, 134 So. 246 (1931). *Board v. Hardtner*, 164 La. 632, 114 So. 494 (1927), cited as illustrative, is really not in point. This was merely a mandamus proceeding to compel certain administrative officers to obey a statute requiring them to transfer the title of certain lands from the State to the Levee District, and to cancel a lease improperly made. The court said (164 La. at p. 639) "No one has any personal or private interest in this suit . . . It does not concern anyone—public official or private citizen—except to know whether the legislature intended, as the wiser public policy, that the mineral rights and forest timber on the lands . . . should belong to the levee boards and be subject to sale or other disposition by them, or should be . . . subject to sale by the officers of the state land department."

[10]*Louisiana v. Jack*, 244 U. S. 397,37 S. Ct. 605, 61 L. Ed. 1222 (1917).

*State v. Tensas Delta Land Co.*,[11] upon which most reliance is placed in both briefs submitted by defendants, arose in 1910. In the opinion on rehearing the Louisiana Supreme Court made it a point so say:[12]

> "*The General Assembly has the power at any time to authorize the Attorney General to institute actions for the use and benefit of the taxpayers and people of any particular levee district.* But as the General Assembly has vested the power to sue and be sued in the Board of Commissioners of the Tensas Levee District, *and has vested no such co-ordinate power in the Governor or Attorney General,* we are of the opinion that the institution of this suit in the name of the State is unauthorized."[13]

Similarly in the United States Supreme Court case, decided in 1917, which arose out of the *Tensas Delta Land Co.* case and which is heavily relied upon by both defendants, *(Louisiana v. Jack)*,[14] this Court was careful to say, through Mr. Justice Clark:

> "This decision [the Tensas Delta Land Co. case] determining the effect of the state statutes [that the state could not sue on a cause of action arising out of Levee Board affairs], where no claim of federal right was involved, is accepted as conclusive upon this court *and unless it has been modified by statute (there has been no modifying de-*

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[11]126 La. 59, 52 So. 216 (1910).

[12]126 La. 59 at p. 74.

[13]Emphasis added.

[14]244 U. S. 397, 37 S. Ct. 605, 61 L. Ed. 1222 (1917). See *Cummins Brief*, p. 9. This case is referred to in the *Shushan Brief* (pp. 5, 6) *sub. nom. United States ex rel Louisiana v. Bordman.*

*cision)* the application of the State to intervene and to appeal was properly denied."[15]

Since 1917, not only has the rule of the *Tensas Delta Land Co.* case has been "modified by statute" so that now the Legislature *has* "vested . . . such coordinate power in the . . . Attorney General,"[16] but there have been "modifying decisions"[17] and indeed constitutional modifications as well.[18]

**a. The Constitution.**

Unlike the Constitution of 1898, under which the *Tensas Delta Land Co.* case arose and was decided, the Louisiana Constitution of 1921 provides:

> "They [the Attorney General and his assistants] or one of them, shall attend to, and have charge of *all legal matters in which the State has an interest*, or to which the State is a party, *with power and authority to institute and prosecute or to intervene in any and all suits* or other proceedings, civil or criminal, as they may deem necessary *for the assertion or protection of the rights and interests of the State.*[19]

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[15]244 U. S. at p. 402.

[16]*Louisiana Act* 13 *of* 1940—the Crime Commission Act.

[17]*State v. Walmsley* 181 La. 597, 160 So. 91 (1935). *State v. Smith*, 182 La. 662, 162 So. 413, (1935).

[18]*Louisiana Constitution of* 1921, Article VII, Section 56.

[19]*Louisiana Constitution of* 1921, Article VII, Section 56. Emphasis added. Compare the corresponding article of the Constiution of 1898, Article 98, which provides merely that "There shall be an Attorney General for the State, who shall be elected by the qualified electors of the State at large every four years. He shall be learned in the law, and shall have actually resided and practiced law, as a licensed attorney, in the State, for five years preceding his election. He shall receive a salary of Five Thousand Dollars per annum, payable monthly on his own warrant. [As amended, Acts 1906, No. 30, adopted, Nov. 6, 1906]"

Can it be successfully contended that the State of Louisiana has no "interest" in the Orleans Levee Board, its "mere political subdivision", as Mr. Justice Van Devanter put it.[20] Can it in any way be said that the solvency of its Levee Board, charged with the duty of protecting its citizens from inundation from the flood-waters of the Mississippi River, is of no "interest"—of no concern to the State? In the light of the above Constitutional provision, must the state stand unconcernedly by while pillagers of its agencies enjoy the fruits of their bribery and corruption of State officials to the extent of hundreds of thousands of dollars of public monies while the Board itself makes no effort at recovery.[21] Must the State stand helplessly by and see public funds squandered by its agency with no more ability to protect them than if the squandering were done by the officers of a private corporation with whose funds it has no concern? Or is the State, under the above provisions of the Constitution, somewhat in the position of a minority stockholder, entitled to protect the corporate fund in which he has an interest against the *ultra vires* acts of the directorate? Or, more closely, in the position of a principal whose agent has been defrauded or has been unfaith-

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[20]See *supra* note 4, and text in connection therewith.

[21]Mr. Shushan, President of the Levee Board from 1929 and as the Complaint alleges (Complaint, Paragraph VII, p. 13) the official who received the bribe of $130,000.00 was first indicted by the United States on March 12, 1935 for evasion of income taxes. During the course of his trial the whole story of the bribe and conspiracy to defraud the Levee Board as set out in the Complaint was disclosed in the testimony. See *United States v. Abraham L. Shushan*, No. 18096, *United States District Court, Eastern District of Louisiana*, and transcript of testimony volumes I, II, and IV. Yet it was not until shortly before this suit was filed that any attempt was made by the Board to recover the funds here involved. In fairness to the gentlemen who are presently Commissioners of the Levee Board, it must be said that they have rendered every cooperation in pressing this matter.

ful to his trust? There can be but one answer to the above questions.

### b. The Jurisprudence.

The more recent jurisprudence of Louisiana has given that answer, and in no uncertain terms. In the recent case of *State ex rel Portirie, Attorney General v. Walmsley, Mayor*,[22] the State through its Attorney General brought an injunction proceeding alleging the unconstitutionality of an Act reorganizing and providing a new method of appointment of the members of the Sewerage & Water Board of New Orleans.[23] The State alleged that "irreparable injury will be done to the State, the City of New Orleans, the property taxpayers of said city, and to certain of its bondholders" if the Sewerage & Water Board were reorganized in accordance with the Act alleged to be unconstitutional. The only evidence of any interest of the State in the action were two affidavits introduced into the record which tended to show, not that the State itself,[24] but that the ability of *State agencies* to market their bonds and obligations with agencies of the Federal Government had been adversely affected by the statute and that the Federal Emergency Administrator of Public Works had withheld an allotment of $2,570,000.00 from the Sewerage & Water

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[22]181 La. 597, 160 So. 91 (1935)

[23]*Louisiana Act 36 of the 2nd Extra Session of* 1934.

[24]The rhetorical statement in one of the affidavits that " the ability of the State to market its bonds and obligations . . . with agencies of the Federal Government . . . has been affected" can not have been accepted by the Court in view of the Constitutional provision (Art. 4, Sec. 2.) in effect since 1879 that "The Legislature shall have no power to contract or to authorize the contracting of any debt or liability on behalf of the State; or to issue bonds or other evidence of indebtedness thereof, except for the purpose of repelling invasion, or for the suppression of insurrection."

Board of New Orleans (a public corporation with power to sue and be sued).

Over the strenuous objection of defendants who, relying, as defendants herein, on the earlier jurisprudence, urged that the State could not maintain the suit without showing some pecuniary interest aside from that of the Board it sought to protect, the Louisiana Supreme Court, adopting the opinion of the trial judge, and basing their decision on the article of the Louisiana Constitution above quoted, held that

> "the state has a sufficient interest in the matters alleged in the petition to institute and prosecute this suit."[25]

In the course of their opinion in the *Walmsley* case, the Louisiana Supreme Court carefully explained that they did *not* hold in the earlier case of *Saint v. Allen*,[26] so heavily relied upon by defendants, that the Attorney General had no right to sue, in the name of the State, on "a cause of action arising from board affairs." The Court said:[27]

> "In this case (*Saint v. Allen*) no question whatever was raised as to the Attorney General's right to bring such a suit against the highway commission in order to have the matter indispute litigated, and *the sole question* decided by the Court was on the proposition whether or not the Attorney General *alone* had the right to represent state boards and agencies; and, contrary to the construction which counsel urged me to place upon

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[25] *Op. Cit Supra* note 22 at p. 603.

[26] 172 La. 350, 134 So. 246 (1931)

[27] *Op. cit supra* note 22 at p. 605. The emphasis is added.

> this case, *it is actually held* by the Supreme Court that 'Attorney General and assistants have charge of all legal matters in which [the] state, as [a] distinct entity, apart from other created entities or corporate agencies, has [an] interest.' (Constitution 1921, article 7 sec. 55, 56.)"

In other words, the Court here explains that in *Saint v. Allen* the Court merely held that the Attorney General was not the exclusive legal representative of state agencies, but that those agencies with corporate powers were authorized to employ separate counsel, and the Court specifically points out that the negative pregnant (i.e. that only the Board can sue through its special counsel, and the State cannot sue upon a Board matter through the Attorney General) is a complete non-sequitur. Indeed, here the court recognizes that the Constitution of 1921, by the incorporation of the new Article VII, Section 56, quoted above, accomplished just what the Court previously said in the *Tensas Delta Land Co.* case the General Assembly had the power to do but had not at that time done,—that is vested co-ordinate power in the Attorney General to institute suit on Board affairs to protect the interests of the State.

The court, in the *Walmsley* case, recognizes that the majority opinion in *Saint v. Allen* failed to make this co-ordinate power clear, and quotes with approval and adopts the dissenting opinion in *Saint v. Allen* with regard to the powers of the Attorney General to sue on behalf of the State, and the nature of the "interest" he is authorized to protect. The Court says,[28]

> "Obviously there can be no dispute as to the right of an Attorney General to represent the state in all litigation of a public character.

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[28] *Op. cit. supra* note 22 at p. 607.

"The Attorney General has authority to prosecute any action maintainable by the state.

"In determining this question it should be noted that pecuniary interest on the part of the state is not decisive of the matter; for the obligation it is under to promote the interest of all and to prevent the wrongdoing of one resulting in injury to the general welfare, is often of itself sufficient to give it standing in court. State v. Zachritz, 166 Mo. 307, 65 S. W. 999, 89 Am. St. Rep. 711; State v. Pacific Express Co., 80 Neb. 823, 115 N. W. 619, 18 L. R. A. (N.S.) 664."

With relation to the other case quoted from and heavily relied upon in defendants' brief i.e. *State v. Standard Oil Co.*, [29]Chief Justice O'Neill, in a concurring opinion in the *Walmsley* case, had the following to say:[30]—

"I doubt that the ruling that the Attorney General had the right to sue on behalf of the taxpayers and bondholders can be reconciled with the ruling made in *State v. Standard Oil Co.*, 164 La. 334, 113 So. 867, where it was held that the Attorney General could not sue in the name of the state on a cause of action which was vested in a legal subdivision of the state."[31]

The latest case on this subject in Louisiana is *State v.*

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[29]164 La. 334, 113 So. 867 (1927)

[30]*Op. cit supra* note 22 at p. 613. Justice Rogers, dissenting in *State v. Standard Oil Co.*, 164 La. 334, 113 So. 867 (1927) had already said (at p. 362) "and respectfully maintain that . . . [*State v. Grace*, 161 La. 1039, 109 So. 830 (1926)] . . . is in direct conflict with and, in effect, overrules the decision in *State v. Texas Delta Land co.*, referred to above."

[31]Chief Justice O'Neill also said, "I doubt that the ruling that the state has a sufficient interest to bring the suit is in accord with the rulings rendered by the court in . . . *Saint v. Allen*, 172 La. 350, 134 So. 246 (1931)." *Op. cit. supra* at p. 613.

*Smith*[32] in which the Supreme Court reiterated the position taken in, and cited with approval, the *Walmsley* case referred to above.

Thus it is clear that the Louisiana cases relied upon by defendants to establish that the State has no interest to sue on this claim have all been expressly overruled by the later jurisprudence, which squarely holds that

> "There can be no dispute as to the right of an Attorney General to represent the state in *all litigation of a public character* . . . that pecuniary interest on the part of the state is not decisive of the matter; for the obligation it is under to promote the interest of all *and to prevent the wrongdoing of one resulting in injury to the public welfare, is often of itself sufficient to give it standing in court.*"[33]

It would indeed be anomolous were a state which permits a mere general taxpayer to protect the state treasury by enjoining the expenditures by state officials of the gen-

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[32]182 La. 662, 162 So. 413. (1935).

[33]181 La. 597 at 607, 160 So. 91 (1935). The line of Louisiana cases cited in the brief on behalf of the defendant Shushan (p. 6) holding that the rule that "prescription does not run against the State" does not apply to levee boards, beside being irrelevant, do not help the defendant. They are all overruled by Louisiana Act 76 of 1938 which provides (§ 2) "Prescription shall not run against any levee district or against the board of commissioners of any levee district, in any civil matter, unless otherwise provided in the State Constitution." The cases referred to and which are overruled by the above statutes are *Board of Commissioners of the Caddo Levee District v. Pure Oil Co.*, 167 La. 801, 120 So. 373, (1929); *Board of Commissioners of Tensas Basin Levee District v. Earle*, 169 La. 565, 125 So. 619, (1930); *Board of Levee Commissioners of Orleans Levee District v. Whitney Trust and Savings Bank*, 171 La. 28, 129 So. 658, (1930); *Board of Commissioners of Port of New Orleans v. Toyo Kisen Kaisha*, 163 La. 865, 113 So. 127, (1927), is not in point involving a different type of state agency.

eral funds in the state treasury,[34] to deny the right of the State similarly to protect the state funds under the administration of one of its governmental agencies as claimed by defendants herein.

## 2. THE CRIME COMMISSION ACT

The second basis of the authority of the State of Louisiana to appear herein as complainant is by virtue of a recent Act of the Louisiana Legislature. A brief history of the Act will give a better understanding of its purposes.

One of the first official acts of the 1940 session of the Louisiana Legislature was the adoption of Act 13 of 1940, creating what is known as the "Louisiana Crime Commission." This act was adopted as a result of a series of disclosures, made in the public press almost daily for a year prior to the adoption of the Act, of the most startling and widespread instances of official misconduct and waste and theft of public funds that had ever been reported in the history of any state in the Union. These "scandals", as they were called, indicated the misuse and diversion to private persons of literally millions of dollars of public funds and property and the impoverishment of the state and the taxpayers for the benefit of a chosen few individuals, who, by virtue of their high public office and of the public trust and confidence reposed in them, were able, through illegal and unlawful machinations, to pervert their public trust and divert the public funds for their personal aggrandizement.

These "scandals" were not mere rumors. The public affairs of the State of Louisiana were so scandalous that

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[34] *Graham v. Jones*, No. 36159 of the Louisiana Supreme Court (1941) not yet reported. Compare *Frothingham v. Mellon*, 262 U. S. 447, 43 S. Ct. 597, 67 L. Ed. 1078 (1923).

the United States government assigned the Assistant Attorney General in charge of the Criminal Division to Louisiana exclusively for a period of almost six months; and the investigations of the Federal Government into the corrupt state of affairs in the State resulted in the indictment and conviction of the Ex-Governor, of the Ex-President of the State University, of an Ex-State judge, of the Ex-Commissioner of Conservation, the Ex-Commissioner of Labor, the Ex-President of the Orleans Levee Board, a number of Ex-State Senators and a large number of other state officials and private individuals doing business with the State. These federal indictments and convictions alone indicated the loss of millions of dollars to the State and showed clearly the necessity for a thorough going investigation into state affairs, and for the recovery of the sums embezzled if the State were to avoid near-brnkruptcy and a serious curtailment of its public services and functions.

With this in view, the Legislature, in the exercise both of its police and its proprietary powers, provided for the establishment of a Commission, composed of the Governor, the Executive Counsel to the Governor, and the Attorney General of Louisiana, and provided that the Commission

> "is vested with the authority, power, and duty to **institute and prosecute** . . . civil proceedings in the name of the State of Louisiana, for the recovery and return of . . . any moneys, property or things of value that may have been fraudulently, unlawfullly, or without authority appropriated, diverted, expended or disbursed by, or taken or acquired from the State."[35]
>
> "As used in this Act, the word "State"' shall mean and include . . . all of the governmental depart-

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[35] Louisiana Act 13 of 1940, section 3a.

ments . . . all public boards and commissions, all public corporations or authorities, all governmental subdivisions of the State . . ."[36]

### a. The State's Right to Sue Under Act 13 of 1940.

The brief filed on behalf of defendants Cummins, Birch and the defendant corporations correctly recognizes that Act 13 of 1940 (the Crime Commission Act) changes the rule of the decisions relied on to establish that the State cannot sue on a cause of action belonging to the Levee Board,[37] but claim that (1) the Act does not authorize the State to sue in the United States Supreme Court (2) Even if authorized, the State is acting merely as a collecting agent for the Levee Board, in which case the Supreme Court has no jurisdiction.

The brief filed on behalf of defendant Shushan, on the other hand, assumes that by the mere provision in the Louisiana Constitution adopted as an amendment in 1928 to broaden the powers of the Board and to authorize a bond issue, that "The Board of Levee Commissioners of the Orleans Levee District shall have and exercise all and singular the powers now conferred upon said Board by law, as well as such powers as are herein granted," completely freezes the powers of the Board as of that date *"to the exclusion* of any such right in the State as such" to sue.[38] Pretermitting the irony of Mr. Shushan's present solicitude for protecting the Board against the State, such in interpretation is totally unacceptable. In the first place, the very next sentence in the amendment relied upon shows

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[36]Louisiana Act 13 of 1940 section 2.

[37]*Cummins Brief* pp. 8 and 9.

[38]*Sushan Brief*, p. 5.

conclusively that it was the intention to grant the Board *exclusive* authority *only* in connection with the construction, etc., of the project involved.[39] Moreover, Act 13 in no way attempts to deprive the Board of "any powers now conferred upon the Board by law," but merely to place the concurrent power of the State to sue to protect its proprietary rights in the Crime Commission by giving it the power to sue on behalf of the State for the recovery of embezzled public funds. This is in no sense a violation of the constitutional provision, which relates only to the powers of the Board, whose concurrent right to sue is not affected.[40] And finally, this provision must be read in conjunction with Article VII, Section 56 of the Louisiana Constitution authorizing the Attorney General to sue "to protect the rights and interests of the State."

### 1. The Crime Commission Act does not restrict the venue of Suits brought by the Commission.

The interpretation sought to be placed on the second paragraph of Section 3-B of the Crime Commission Act[41] by defendants, which would limit the authority of the Commission in bringing suits on behalf of the State only to

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[39]*Louisiana Constitution of* 1921, Article 7, Section 7 (a) "The Board of Levee Commissioners of the Orleans Levee District shall have and exercise all and singular the powers now conferred up said Board by law as well as such powers as are herein granted. Said Board shall have full and *exclusive* right, jurisdiction, power and authority to locate, relocate, construct, maintain and improve levees, embarkments, seawalls, jetties, breakwaters, waterbasins, and other works in relation to this project, . . ." (Emphasis added)

[40]For an instance of the Federal Government requiring concurrent suits involving its corporate agencies see 38 *Stat.* 219-220; Jud. Code §§207,208, 211; Act of Oct. 22, 1913, commented on in *Texas v. Interstate Commerce Commission*, 258 U. S. 158, 42 Sup. Ct. 261, 66 L. Ed. 531 (1921).

[41]Louisiana Act 13 of 1940.

Baton Rouge, La., or at the domicile of the defendants, is so strained and so unusual as not to deserve serious consideration. This section merely provides[42]

> "That any suit filed under the provisions of this Act *may* be instituted in the Nineteenth Judicial District, Parish of East Baton Rouge, Baton Rouge, Louisiana, or at the domicile of the defendant, or anyone of the defendants named in such suit, at the discretion of the Commission . . ."

It is obvious that this provision is merely permissive and not limitative, and it is hardly to be assumed that the Legislature of Louisiana, meant, in such cavalier fashion, to abolish the provisions of the Louisiana Code of Practice relating to the venue affecting real estate, sheriff's bonds and what not[43] so far as the Crime Commission is concerned. By the same section for instance, the Commission is entitled to proceed by attachment, and in every other case in which a suit is instituted by attachment against a non-resident defendant, the proper venue is the Court in whose district the property is located. It is hardly possible that the Legislature intended to change the venue in such cases to Baton Rouge, where suits by the Crime Commission are involved. Moreover, this section interpreted as the defendants suggest would completely oust the jurisdiction of the Federal Courts—not only the Supreme Court of the United States, but the Federal District Courts as well. Certainly these results cannot flow from the mere permission to institute suits in the Parish of East Baton Rouge, Baton Rouge, La. Moreover, domicile so far as the United

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[42]Louisiana Act 13 of 1940, section 3b. Emphasis added.

[43]Compare, for instance *La. Code of Practice* Articles 163, 164, 165, 166, 392, 89, 1072. See also Dart, *Louisiana General Statutes* §§1895-97; 1248(d)-1249; 1933 (12), (19); 1210 etc.

States Supreme Court is concerned, is national in scope, and all of the defendants in this case are domiciled in the United States of America. It can hardly be claimed that the defendants, domiciled in the United States, are not subject to the territorial jurisdiction of the Supreme Court.

**2. The State is not Acting as a Collection Agency.**

It is a fundamental error to assume that suits brought in the name of the State of Louisiana, under the authority of Act 13 of 1940 are suits in which the State is acting as a mere collecting agency. The description of the Crime Commission Act already given above should, in itself, shows that the state brings suit in its sovereign capacity acting under its police powers, and to vindicate its proprietory rights. Indeed it is a matter of self-preservation. Moreover, the Act provides that the Crime Commission itself, and not the State agency involved, is

> "to receive any monies . . . in settlement of payment of claim of judgment; to deposit any monies recovered with the State Treasurer; or to use any monies so recovered to continue or further its investigations, civil suits or prosecutions and to dispose of any property or thing of value recovered as the commission deems proper."[44]

This provision of the Crime Commission Act completely repudiates any idea that the State in asserting this claim of the Levee Board is acting as an Agent of the Levee Board, because if it were then the monies recovered would be inevitably the property of the Board. Under the provisions of the Act, however, the monies recovered are not the property of the Board, but are to be deposited in the

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[44]Louisiana Act 13 of 1940, section 3b.

State Treasury, or to be used to further the investigations and affairs, not of the Levee Board, but of the Crime Commission. Hence, it is apparent that the line of authorities following *New York v. Louisiana*[45] relied upon by the defendant for supporting their position are inapplicable. Moreover, in all of the cases cited by the defendants, the State is appearing as the plaintiff, not for the purpose of protecting its sovereign or proprietary rights, but to collect the private claims of its individual citizens or to represent the economic interests of certain classes of citizens within its boundaries. The present case, quite to the contrary, presents a claim that has always been one of a public nature, involving the proprietary interests of the State, and the only question that can possibly arise is whether the State has placed this claim irrevocably beyond its power. This, it is certain, it has not done. Indeed, it is reminiscent of the languages of the Jabberwocky to claim, as the defendants do, that the principal in asserting a claim arising out of an act of the agent, is acting as an agent of the agent.

### c. THE INTEREST OF THE STATE

The above resume of Louisiana authorities has clearly established that under the general law of the State of Louisiana, even independently of the Crime Commission Act, the Attorney General is authorized to assert the co-ordinate interest of the State of Louisiana in a cause of action arising from Board affairs, and that the Crime Commission Act expresely and unambiguously gives the State the power to sue thereon. Indeed the Louisiana jurisprudence and the Act probably go further in recognizing a right in the State to sue as *parens patriae* and to protect its agencies

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[45] *Infra* note 47 and text in connection therewith.

and the general interest and welfare of its people than the United States Supreme Court has gone.[46] But the interest of the State of Louisiana in asserting the cause of action herein proposed is much greater than the minimum required by the Louisiana jurisprudence, and the Crime Commission Act, and meets every test of the required interest laid down by the United States Supreme Court.

In the first place, it must be pointed out that the analogy sought to be drawn by the defendants between this case and the line of cases following *New Hampshire v. Louisiana and New York v. Louisiana*[47] is completely false. In those cases the states were asserting purely[48] or essentially[49] *private*, as distinguished from public or sovereign claims,[50] and indeed for the purpose of evading the pro-

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[46]See *Louisiana v. Texas*, 176 U. S. 1, 20 S. Ct. 251, 44 L. Ed. 347, (1899); *Oklahoma v. A. T. and S. F. Ry.*, 220 U. S. 277, 31 S. Ct. 434, 55 L. Ed. 465 (1911); and the line of cases beginning with *New Hampshire v. Louisiana*, 108 U. S. 76, 2 S. Ct. 176, 27 L. Ed. 656 (1883). Compare *Missouri v. Illinois*, 180 U. S. 208, 21 S. Ct. 331, 45 L. Ed. 497 (1901); *Pennsylvania v. West Virginia*, 262 U. S. 553, 43 S. Ct. 658, 67 L. Ed. 1117 (1923).

[47]108 U. S. 76, 2 S. Ct. 176, 27 L. Ed. 656 (1883).

[48]*New Hampshire v. Louisiana* 108 U. S. 76 at 88 and 91; 2 S. Ct. 176, 27 L. Ed. 656 (1883).

[49]i. e. Claims which could and should have been set up by its citizens themselves. Thus in *Kansas v. U. S.*, 204 U. S. 331, 27 S. Ct. 388, 51 L. Ed. 510 (1907); *Oklahoma v. S. F.* 220 U. S. 277, 31 S. Ct. 434, 55 L. Ed. 465 (1911); *Louisiana v. Texas*, 176 U. S. 1, the court said at p. 22, "But in order that a controversy between States, justiciable in this court, can be held to exist, something more must be put forward than that the citizens of one state are injured by the maladministration of the laws of another."

[50]Compare *Missouri v. Illinois*, 180 U. S. 208, 21 S. Ct. 331, 45 L. Ed. 497 (1900); *Pennsylvania v. West Virginia*, 262 U. S. 544, 43 S. Ct. 636, 67 L. Ed. 1112 (1923); *Ohio v. Chattanooga Boiler and Tank Co.* 289 U. S. 439, 53 S. Ct. 663, 77 L. Ed. 1307 (1933).

visions of the XI Amendment to the United States Constitution. In *New Hampshire v. Louisiana*[51] the court bluntly said:

> "The real question, therefore, is . . . whether a State can allow the use of its name in such a suit for the benefit of one of its citizens . . . The evident purpose of the [XI] amendment . . . was to prohibit all suits against a State by or for citizens of other States, or aliens, without the consent of the State to be sued, and, in our opinion, one State cannot create a controvery with another State, within the meaning of that term as used in the judicial clause of the Constitution, by asserting the prosecution of debts owing by the other State to its citizens."

In the instant case, quite to the contrary, the claim sued upon is, and has always been, a purely public claim in which the State has always had and exerted a real economic and sovereign interest, as the owner of the funds. As pointed out elsewhere in this brief[52] the interest of the State in the Levee Board is such that it cannot stand idly by while its agency is crippled in the finances under its administration and in its functioning by embezzlement and pillage.

Indeed, the interests of the State, as such, and those of the Levee Board, are so inextricably intermingled, so closely co-ordinated, and so interrelated, that it is impossible to tell where the one leaves off and the other begins. It has already been pointed out that the property and the funds under the administration of the Levee Board are none the

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[51] *Op. cit supra* note 46, 108 U. S. 76 at 88 and 91.

[52] See *supra* p. —— it sez.

less the property of the State, and that both have authority to sue with relation thereto.[53] In addition both the Levee Board and the State are under the obligation to build, contract for and maintain a levee system, and even when the Levee Board itself constructs levees, it must be done in cooperation with, and under the supervision of the State Board of Engineers, which is charged with the duty of providing technical advice, supervisory services and general planning to the Levee Boards of the State.[54] Aside from the taxes the Orleans Levee Board is itself authorized by the Legislature to levy, the State of Louisiana contributed $10,000.00 annually to the support of the Orleans Parish Levee Board from the General Fund of the State until 1939,[55] and the Board of State Engineers is now authorized to spend, in its discretion, up to the total amount of its General Fund for levee purposes in any Levee District.[56]

It is apparent, then, that the interest of the State in the finances and functioning of the Orleans Levee Board is direct and immediate—that to the extent that its finances and functioning are impaired the State must, through the Governor or the State Board of Engineers, assume its responsibiliities.[57] Moreover, the General Fund not otherwise appropriated, of the State Treasury stands pledged as a guarantee of a debt of the Levee Board to the Board of Commissioners of the Port of New Orleans amounting to

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[53]*Op. cit. supra* note 2.

[54]*See Dart's "Louisiana General Statutes"* sections 6741, 6846, and 6744, also *Louisiana Constitution of* 1921, Article 16, Section 7(a).

[55]Louisiana Act 102 of 1892, section 1, repealed by Louisiana Act 291 of 1938, section 1.

[56]*Op. cit. supra* note 55.

[57]This responsibility is particularly pressing on the State in view of Section 3 of Act 29 of the 2nd Extra Session of 1935 which directs the State Treasurer to reserve out of the first revenues of the Orleans Levee Board a sufficient amount to pay all principal and interest on its bonded indebtedness.

approximately one million dollars a year until 1952.[58] That the financial burden on Levee Boards is heavy and the consequent responsibility of the State to divert additional funds is immediate, is shown from the following excerpt from the current Report of the Board of State Engineers:[59]—

> "The local Levee Boards . . . have been assuming a burden which is in excess of their financial ability to carry, and, as a result in some instances, have anticipated their revenues for several years by issuing certain certificates of indebtedness to be redeemed when funds will be available
>
> Moreover, some of the Levee Boards in their extremity had been forced to call upon the Board of State Engineers to cooperate by advancing money to them out of the General Engineer Fund . . .

And again it must be re-emphasized that the mere fact that the Levee Board administers state funds makes them none the less state monies. Both the State and the Board are entitled to sue to protect this fund—the Board to protect its administration, the State, its title. Hence it is immaterial whether the Louisiana Constitution has vested the administration of the funds sued for by the State in this case in the Levee Board—the title is still in the State.[60]

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[58]See Louisiana Act 29 of 2nd Extra Session of 1935, section 4.

[59]*Report of The Board of State Engineers of The State of Louisiana, From January* 1, 1938 *to January* 1, 1940. p. 35.

[60]See *Shushan Brief*, p. 5. The argument here advanced by defendant Shushan completely overlooks the fact that the ownership of the fund is in the State and the Board merely has the administration thereof, giving a coordinate right to the State and to its agency to protect the fund. It must be assumed that if the State recovers, it will not act unconstitutionally to deprive the Board of the administration of any part of the State funds it may recover. Moreover, it would seem that the Levee Board alone is entitled to raise this question and then only after the recovery is made.

The interest of the State in the claim here involved is therefore immediate and real, and properly asserted by the State in its sovereign and proprietary capacity.

This Court has many times held that a state has such an interest that it may properly represent its public institutions in this Court. In *Pennsylvania v. West Virginia*,[61] the States of Pennsylvania and Ohio sought to enjoin the enforcement of a statute of West Virginia whereby the shipment of natural gas from the latter state would be greatly curtailed. Pennsylvania and Ohio alleged that the enforcement of the statute would, among other things, subject them to irreparable injury in respect of many of their public institutions and governmental agencies which long had been and were then using this gas. To the objection that the State was not properly a party plaintiff this Court said:[62]—

> "The first question is whether the suits involve a justiciable controvery between the States in the sense of the Judiciary Article of the Constitution. We are of opinion that they do . . .
>
> The attitude of the complainant States is not that of mere volunteers, attempting to vindicate the freedom of interstate commerce, or to redress purely private grievances. Each sues to protect a two-fold interest one as the proprietor of various public institutions and schools whose supply of gas will be largely curtailed or cut off by the threatened interference with the interstate current, and the other as the representative of the consuming public whose supply will be similarly affected. Both interests are threatened with serious injury."

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[61] 262 U. S. 553, 43 S. Ct. 658, 67 L. Ed. 1117 (1923).

[62] *Op. cit supra*, 262 U. S. at p. 591.

The same result was reached in *Missouri v. Illinois and the Sanitary Drainage District of Chicago*,[63] only in this case the State was a defendant, rather than a plaintiff, and was held properly a party to a suit involving one of its agencies. There the Court, speaking through Mr. Justice Shiras, said:[64]—

> "It is further contended, in support of the demurrer, that even if the State of Missouri be the proper party to file such a bill, yet that the proper defendant is the Sanitary District of Chicago solely, and that the State of Illinois should not have been made a party, and that, as to her, the demurrer ought to be sustained.
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> "The contention rather seems to be that, because the matters complained of in the bill proceed and will continue to proceed from the acts of the Sanitary District of Chicago, a *corporation of the State of Illinois*, it therefore follows that the State, as such, is not interested in the question, and is improperly made a party.
>
> We are unable to see the force of this suggestion. The bill does not allege that the Sanitary District is acting without or in excess of lawful authority. The averment and the conceded facts are that the corporation as an egency of the State to do the very things which, according to the theory of the complainant's case, will result in the mischief to be apprehended. It is state action and its results that are complained of—thus distinguishing this case from that of *Louisiana v. Texas*, where the acts sought to be restrained were alleged to be those of officers or functionaries

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[63]180 U. S. 208, 21 S. Ct. 331, 45 L. Ed. 497 (1901).

[64]*Op. cit supro* note 63, 180 U. S. 208 at 241. Note also Pennsylvania *v. West Virginia, supra*, note 61.

proceeding in a wrongful and malevolent misapplication of the quarantine laws of Texas. *The Sanitary District of Chicago is not a private corporation, formed for purposes of private gain, but a public corporation, whose existence and operations are wholly within the control of the State.*

The object of the bill is to subject this public work to judicial supervision, upon the allegation that the method of its construction and maintenance will create a continuing nuisance, dangerous to the health of a neighboring State and its inhabitants. *Surely, in such a case, the State of Illinois would have a right to appear and traverse the allegations of the bill, and having such a right, might properly be made a party defendant."*[65]

In a case directly in point, *Ohio v. Chattanooga Boiler & Tank Co.*,[66] this court entertained an action by the State of Ohio for the protection of, and to recover money for, the industrial insurance fund administered by the Ohio Industrial Commission, a special insurance fund in the State Treasury administered for the benefit only of those entitled to participate therein. And in *Florida v. Anderson*,[67] a case presenting almost exactly the same facts, Mr. Justice Bradley, speaking for the Court, said:

"The first question which naturally presents itself is,whether the State of Florida has such an interest in the subject matter of the suit, and in the controversy respecting the same as to give it a standing in court. It is suggested that the trustees of the internal-improvement fund

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[65]Emphasis added.

[66]289 U. S. 439, 53 S. Ct. 663, 77 L. Ed. 1307 (1933).

[67]91 U. S. 667 at p. 675 seq., 23 L. Ed. 290 (1875). It is interesting to observe that this case was filed "on behalf of the said State and of the trustees of the internal-improvement fund of the State . . . ."

are the only parties legally interested, and that they have no right to bring an original bill in this court. To this it may be answered, in the first place, that the State has a direct interest in the subject-matter (the railroad in question) by reason of holding (as it does) the four millions of bonds which are a statutory lien upon the road. In the next place, the interest of the State in the internal-improvement fund is sufficiently direct to give it a standing in court, whenever the interests of that fund are brought before a court for inquiry.

"From the statement already made in reference to the history and characted of this fund, and the duties of the trustees in regard to it, it is apparent that the trustees are merely agents of the State, invested with the legal title of the lands for their more convenient administration; and that the State remains in every respect the beneficial proprietor, subject to the guaranties which have been made to the holders of railroad bonds secured thereby. The residuary interest in the fund belongs to the State. The fact that the trustees consist of the Governor and other executive officers, and that they are charged with the duties of drainage, reclamation, and settlement of the public lands (duties of a purely public character), shows that they are mere public agents invested with an important branch of the State administration.

"Now, to protect its interests, it is competant for the State, seeking equitable relief against citizens of another State, to file an original bill in this Court. The reference to the trustees in the bill cannot affect the jurisdiction of the Court, inasmuch as they are not the litigants before it . . ."

In view of these authorities, it is clear that the State of Louisiana is a proper party to this suit.

Both of the defendants in their briefs have resorted to the argumentum *ad terrorem*.[68] They suggest that to permit this suit would open the door of this Court "to suits arising out of the activities of any city, village, levee board or what not that a state should choose to sue for."[69] Obviously this is not so. Neither *Pennsylvania v. West Virginia, Missouri v. Illinois, Florida v. Anderson* nor *Ohio v. Chattanooga Boiler & Tank Co.* have had that effect; and Louisiana does not ask this Court to go one step beyond these prior cases. The relation of the State of Louisiana to the Levee Board is totally different from its relation to its cities, towns, villages and what nots, as we have gone to such great pains to point out in the preceding pages. The State has no co-ordinate rights in the affairs of these bodies—it does not "own" the funds and property of its municipalities as it does that of its Levee Boards. They are not created and administered to perform state functions, but only to serve local needs. This Court has already decided, in *Louisiana v. Texas*[70] and in other cases, both that a state has no standing in this Court merely as *parens patriae*, but must assert some proprietary right or show that it is affected in its sovereign or corporate capacity, and that the State must show that the injury threatened or suffered is more than merely local in character. This is clearly expressed by Mr. Justice Brown in his concurring opinion in *Louisiana v. Texas* where he says:[71]

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[68]*Cummins Brief* p. 12; *Shushan Brief* p. 13. The question of trial by jury will be considered later. See *Infra* p. 39.

[69]*Cummins Brief*, p. 12.

[70]176 U. S. 1, 20 S. Ct. 251, 44 L. Ed. 347 (1899).

[71]*Op. cit supra* 176 U. S. 1 at p. 28.

> "The controversy is not one in which the citizens of Louisiana generally can be assumed to be interested, but only the citizens of New Orleans, and it therefore seems to me that the State is not the proper party complainant."

Thus the Court is already fully protected from all the ills which the defendants predict for it, and a record of five cases of this type in the 151 years of existance of this Court presents neither a terrifying picture nor promises any likelihood of a change in the near future. To ask this Court to dismiss this case, where the proprietary interests of the State of Louisiana are so clearly involved, merely because the State fund it seeks to protect is administered through a state agency rather than by the State directly, comports neither with justice, with the Constitution, nor with the jurisprudence of this Court.

## II. THE PRESENCE OF SHUSHAN, A CITIZEN OF LOUISIANA, AS DEFENDANT, DOES NOT DEFEAT THE JURISDICTION OF THE COURT

The second ground upon which the motion of the State of Louisiana is opposed is that the presence of Shushan, a citizen of Louisiana as defendant, defeats the jurisdiction of this Court.

### 1. The Supreme Court has Original Jurisdiction Where the Complaint Against the Citizen of the Complaining State is Separable from that Against Citizens of the Other States

It has already been pointed out that in all cases in which this Court has declined jurisdiction because a citizen of the complainant State was, or should have been joined

as a defendant, that citizen was invariably an *indespensible party* to the suit.[72] Until recently, the question of whether a State which had a separable controversy with one of its citizens could join him in a suit against citizens of other states was left completely open, both by the Constitution and by the jurisprudence of this Court. However, in the recent case of *Ohio v. Helvering*[73] this Court assumed original jurisdiction under such circumstances. In *Ohio v. Helvering* the State of Ohio invoked the original jurisdiction of this Court to enjoin the enforcement against it of federal statutes imposing taxes upon dealers in intoxicating liquors. The complaint was directed at the Commissioner of Internal Revenue and several collectors of internal revenue. A rule was directed in that case, as in this, to the defendants to show cause why such leave should not be granted. The Solicitor General of the United States urged as one of the grounds of the opposition to the rule that

> "The cause is not within the original jurisdiction of this Court, because four of the defendants are citizens of the plaintiff State."[74]

and the Court observed that "the other defendants are collectors of internal revenue in . . . the State of Ohio."[75] The Court nevertheless assumed jurisdiction of the controversy and adjudicated the validity of the tax, holding in effect that the complaint stated no cause of action and consequently denying leave to file. In view of the firmly estab-

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[72]See *Original Brief State of Louisiana*, p. 5

[73]*Ohio v. Helvering*, 292 U. S. 360, 54 S. Ct. 725, 78 L. Ed. 1307 (1934).

[74]*Op. cit supra* note 72, at p. 365.

[75]*Op cit. supra* note 72 at p. 366.

lished rule that the Supreme Court cannot assume jurisdiction not granted by the Constitution,[76] and that circumstances claimed to defeat the jurisdiction of the Court were urged upon it and rejected, it must be assumed, either that the prior jurisprudence was thereby overruled *sub silentio*, or that some distinguishing feature was present. The distinguishing feature is that in *Ohio v. Helvering* the defendant citizens of Ohio were not indispensible parties, and even had the complaint been dismissed as to them, jurisdiction would still have been retained as to the defendants not citizens of Ohio.

The reason for this rule is obvious. Where the effect of the joinder of the defendant citizen of the complaining state will be completely to oust the jurisdiction of the Supreme Court from the entire controversy, then the matter is at an end, and the Court can proceed no further. But where, as in a separable controversy, the effect is merely that a defendant will be dropped from the proceeding, and the proceeding itself will continue as to the remaining jurisdictionally unobjectionable defendants, then all of the principles and considerations so cogently and eloquently stated by Messers Justices Harlan and Brewer in their dissenting opinion in *California v. Southern Pacific Co.*[77] become fully effective. These principles are so well stated there that it will serve no good purpose simply to repeat them here. Suffice it to say that the same principles apply with equal force to the case at bar.[78]

However, out of an excess of caution, the State of

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[76]*Marbury v. Madison*, 1 Cranch 137, 2 L. Ed. 60 (1803), also, *U. S. v. Yale Todd*, 13 Howard 52, 14 L. Ed. 47 (1794).

[77]*California v. Southern Pacific*, 157 U. S. 229 at p. 262, 15 S. Ct. 591, 39 L. Ed. 683. (1895).

[78]See Brief for Louisiana, pp. 4 and 5.

Louisiana has, in its complaint,[79] specifically invited this Court to dismiss the complaint as to defendant Shushan (the citizen of Louisiana) if this Court finds that to retain him as a formal party will defeat the original jurisdiction of this Court, and to proceed with the adjudication of the complaint against the other defendants, all residents of states other than Louisiana. Defendants claim, on the other hand, that the entire complaint should be dismissed because defendant Shushan is a necessary and indespensible party.[80]

It may be observed *en passant* that it is not enough that a jurisdictionally objectionable party be merely necessary to defeat the jurisdiction of this Court. He must be *indispensible.* Thus the Court, in *Minnesota v. Northern Securities Co.*[81] said:

> "They are; 1. Formal parties. 2. Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties."

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[79]Complaint, Art. III, p. 10.

[80]*Cummins Brief*, p. 12; *Shushan Brief* p. 8.

[81]*Minnesota v. Northern Securities Company*, 184 U. S. 199 at 235,236, 22 S. Ct. 308, 46 L. Ed. 499 (1902) following *Shields v. Barrow*, 17 How. 130; See also *California v. Southern Pacific Co.*, *op. cit supra*, note 77.

The Court then decided that certain jurisdictionally objectionable *"indispensible parties*, without whose presence the Court . . . cannot proceed"[82] must be joined. However in the instant case, defendant Shushan is neither necessary nor indispensible.

### 2. The Complaint Against Defendant Shushan Is Completely Separable and May Be Dismissed as to Him Alone.

While the brief filed on behalf of defendants Cummins, et al., avoide characterizing the defendant Shushan as "indispensible," that filed on his behalf iterates and reiterates that he is both necessary and indispensible without referring to a shred of authority to support it, and without adverting to the important difference observed by the jurisprudence between mere necessity and indispensibility.[83] The absence of authority is quite understandable. Indeed, the action by the State in joining the named defendants is not based on any theory of mutual interdependence, but on Section 20 (a) of the new Federal Rules of Practice.[84]

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[82] *Minnesota v. Northern Securities Companies, supra* note 81, at p. 247. See also *California v. Southern Pacific Co., supra*, note 77, particularly at pp. 256, 260, and 261. Also *Texas v. Interstate Commerce Commission* 258, U. S. 158, 42 S. Ct. 261, 66 L. Ed. 531 (1921). In *Pennsylvania v. West Virginia supra*, note 46, the majority decided in effect that the gas corporations were necessary, but *not* indespensable, and hence accepted jurisdiction.

[83] *Shushan Brief*, p. 8-11 and compare fn 11.

[84] Federal Rule 20 (a) . . . All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action . . . Judgment may be given . . . against one or more defendants according to their respective liabilities.

This suit is essentially one for a declaration of the nullity of a contract between the Levee Board and the Orleans Dredging Co., Inc., the "dummy corporation" of Cummins, Birch and the corporate defendants,[85] in which Shushan does not appear to have had any interest. It is difficult to see either the necessity or the indispensibility of Shushan as a party to such a suit. Based on the nullity of the contract, complainant then proceeds to pray in several alternatives in quasi-contract for the restitution of money unlawfully had and received by the corporations—i.e. for unjust enrichment.[86] Clearly Shushan is neither necessary nor indispensible to a determination of the quasi-contractual obligations and liability of the defendant corporations,[87] although he may be useful as a witness. True, Shushan, along with defendants Cummins and Birch, are alleged to be liable for the same amounts in each of these counts, but their liability is purely delictual, and sounds in tort, as "conspiring individual co-defendants," and is entirely independent of the liability of the corporations and of each other. Even Shushan admits that some relief is sought against him alone,[88] and some against the other defendants independently of Shushan on theories of constructive trust.[89]

Shushan complains that relief is sought against him "*in*

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[85]This is the first prayer for relief. See Complaint Prayer, Paragraph1, p. 23. A declaration of nullity of the contract is essential in view of Louisiana Civil Code Articles 1881, 1882, and 2221.

[86]See Complaint, Paragraph XIV a and b, XV; Prayer 2, 3, and 4.

[87]Only the person who "*receives* what is not due to him . . . obliges himself to restore it to him from whom he has unduly received it." *Louisiana Civil Code Article* 2301.

[88]*Shushan Brief*, p. 8. See Complaint Paragrph XVI, p. 22.

[89]See Complaint, Paragraph XVI, p. 22.

*solido*"—but this word has no connotation of inseparability; indeed it was conciously chosen for its separable connotation. The Louisiana Civil Code illustrates its meaning thus[90]

> When several persons obligate themselves to the obligee by the terms[91] in solido, or use any other expressions, which clearly show that they intend that each one shall be separately bound to preform the whole of the obligation, it is called an obligation in solido on the part of the obligors.

Indeed, the very closest defendant Shushan comes to being "indispensible" is as a joint tort-feasor, and it is too well established that they can be sued singly or in *globo* without affecting the liability of the others to require citation.[92]

*California v. Southern Pacific Co.*,[93] the case so heavily relied upon by defendants as authority for the dismissal of this suit because of Shushan,[94] poises the question of separability as being

> "whether other persons who have an *immediate interest* in resisting the demand of complainant are not *indispensable parties* or, at least, so far necessary that *the cause should not go on in their absence.* Can the court proceed to a decree . . . and do complete and final justice, without affect-

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[90]*Louisiana Civil Code* Article 2082.

[91]This obligation may be either contractual or *delictual*, see *Louisiana Civil Code* Article 2324.

[92]*Rowland v. Horst*, 188 Cal. 772, 297, Pac. 373 (1922) holding joint tortfeasors separable.

[93]*Op. cit. supra* note 77.

[94]It must again be pointed out here that the Court specifically held in this case that the parties were *indispensable.*

> ing other persons not before the court, or leaving the controversy in such a condition that its final termination might be wholly inconsistent with equity and good conscience."[95]

What "*immediate interest*" does Shushan have in the recission of the contract; in the liability of the other defendants in tort and for unjust enrichment? How will he be affected, in his person or his property, by any decision of this or any court concerning the other defendants? Obviously, in no way. Clearly this Court can "proceed to a decree and do complete and final justice without affecting persons not before this Court" and without affecting Shushan at all.

Indeed, what defendants other than Shushan are doing here, is attempting to set up their own fraud, their own bad faith, in an attempt to deprive Louisiana of recourse to this Court. They claim that by their bribery alone they have closed the doors of the Supreme Court on Louisiana. One cannot believe that a briber can so easily control the original jurisdiction of the Supreme Court.

## III. THERE IS NO BASIS UPON WHICH THIS COURT CAN REFUSE THE COMPLAINT PROPOSED BY LOUISIANA

The third ground upon which the motion of the State of Louisiana is opposed is, as stated in the brief filed on behalf of Shushan:—[96]

"This Court should decline to take jurisdiction of

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[95]*Op. cit supra* note 77 at p. 251. See also *Minnesota v. Northern Securities Company, supra*, note 81, at p. 238.

[96]*Shushan Brief*, p. 11 seq. the objection filed by *Cummins* et al is substantially the same. See *Cummins Brief*, p. 15 seq.

> this cause, because it is not a suit in equity, but is a simple action at law for an ordinary money demand, required to be tried by pury".

It should be pointed out at the outset that this is nothing more than a bald invitation to the Supreme Court to ignore the provisions of the United State Constituion. Article III, Section 2 of the Constitution specifically provides that

> "The Judicial Power shall extend to all Cases, *in Law and Equity,*

and it should make no difference whether the proposed complaint states a cause of action cognizable on either side of the Court, so long as it is within the original jurisdiction of this Court.

Defendants' anxiety to make this case appear as an action at law rather than one in equity flows from a twofold purpose, one is an attempt to terrorize the court by the prospect of a jury trial,[97] the other, an attempt to bring the case within the language used by the court in *Massachusetts v. Missouri.*[98]

While this is not the time to argue a motion for the impanelling of a jury, it should be too clear for argument that the defendants are not entitled thereto, there being no "plain, adequate and complete remedy . . . at law" as required by the Judiciary Act. The defendants strive mightily, but to no avail, to make it appear that Louisiana's complaint is a simple action at law. They have combed the

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[97] *Shushan Brief*, p. 14; *Cummins Brief*, p. 17.

[98] 308 U. S. 1, 60 S. Ct. 39, 84 L. Ed. 3 (1939).

digests to find five cases, none similar to the case at bar, in which complaints stated in equity have been held to be essentially actions at law. *Buzzard v. Houston*[99] was a case involving simple facts. The complaint was that, through fraud, the defendant had procured complainant to surrender a valuable contract and accept an assignment of a valueless one, whereby complainant was injured to the extent of $25,000.00. Although complainant in that case asked for recission, for discovery, and for other equitable relief, the Court held that "The present bill states a case for which an action of deceit could be maintained at law, and would afford full, adequate and complete relief." In *U. S. v. Bitter Root Co.*[100] no contract was involved, and the case was, as stated by the Court,

> "really nothing but an action of trespass or trover to recover damages sustained by complainant by reason of the wrongful cutting, carrying away and conversion of the property of the complainant, consisting of the timber on the land mentioned in the bill; and for the wrong thus done we think it clear that the complainant has a plain, adequate and complete remedy at law . . ."

while in *Currenden v. Middleton*,[101] Mr. Justice Holmes said

> The relief sought is simply a decree for damages . . . so that although the word restitution is used,

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[99]119 U. S. 347, 7 S. Ct. 274, 30 L. Ed. 446 (1886). The quotation appears at 119 U. S. p. 353.

[100]200 U. S. 451, 26 S. Ct. 318, 50 L. Ed. 550 (1906). The quotation appears at 200 U. S. p. 472.

[101]232 U. S. 633, at p. 636, 34 S. Ct. 458, 58 L. Ed. 765 (1913).

*there is no attempt to rescind, to follow a specific fund or to establish a trust.*[102]

How different is the instant case! While the State of Louisiana does not recognize equity as a separate jurisdiction,[103] the essence of this suit is, as pointed out above, for a declaration of the nullity and a recession and cancellation of the contract as required by the law of Louisiana[104] which falls within the equitable jurisdiction of this Court. The whole basis of the case is relief from the terms of a contract fraudulently procured, and one of the alternative claims seeks relief from a hard bargain.[105] Louisiana

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[102]The other two cases are relied upon by defendant simply to show that two threatened suits are not sufficient multiplicity to justify equity taking jurisdiction. But this is not the only basis for equity jurisdiction in this suit, and many more than two suits may be necessary. While all of the defendants other than Shushan are presently residing or doing business in New York, one of the corporations is domiciled in New Jersey and Cummins is domiciled in California. Moreover, *Empire Engineering Corp. v. Mack* 217 N. Y. 85 (1916) really held that an interpleader proceeding in which the amount of the fund to be deposited was in dispute defeated equity jurisdiction, and in *Kohlhamer v. Smietanka*, 239 Fed. 408 (1917), a class suit, the court held that the petitioner was not representative of the class he sought to represent.

[103]La. Civil Code Art. 21. See Franklin, *Equity in Louisiana: The Role of Article 21* [1934] 9 *Tulane L. Rev.* 485.

[104]La. Civil Code Art. 1881, 1882, 2221. It is assumed that the law of Louisiana will govern at least this aspect of the suit, in view of the fact that the contract was executed and to be performed in Louisiana, and the fraud practiced and consumated in Louisiana.

[105]See Complaint, Paragraph XV, p. 21; Prayer, 4. The language of Hamilton in *The Federalist* shows how clearly the the equitable jurisdiction of the Supreme Court applies to this aspect of the case. Mr. Hamilton says, in Federalist 80:

It has been asked, what need of the word "equity." What equitable causes can grow out of the Constitution and laws of the United States? There is hardly a subject among individuals which may not involve those ingredients of FRAUD, ACCIDENT, TRUST, or HARDSHIP, which would render the matter an object of equitable rather than legal juris-

specifically claims that certain of the funds, the recovery of which she seeks, are "impressed with a trust,"[106] and the whole case against the corporations is based upon following the funds paid the Orleans Dredging Co., their "dummy corporation." Moreover the complaint clearly shows that a discovery and an accounting, not of a simple debt, but of a technical, complicated engineering project of great magnitude and involving almost a million dollars is necessary to fix the liability of defendants under certain of the demands. It seems too clear for citation of authority that such a controversy is properly one for the exercise of this Court's equitable jurisdiction, and that a jury would be of no value in the technical accounting problems involved herein.

This case being so clearly on the equity side of the Court, the language in *Massachusetts v. Missouri* is completely inapplicable.

With regard to *Massachusetts v. Missouri*, it seems that the defendants have entirely misunderstood the purport of the lanuage of Mr. Chief Justice Hughes so heavily relied upon by them. Chief Justice Hughes neither said, nor intended to say, that merely because a State invoked the original jurisdiction of the Supreme Court in an action at law, rather than in equity, for a money demand that the Court was entitled to exercise a discretion to refuse it admittance. The judiciary articles of the Constitution are too clear on this, and the original jurisdiction of this Court

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diction, as the distinction is known and established in the several States. It is the peculiar province, for instance, of a court of equity to relieve against what are called hard bargains; these are contracts in which, though there may have been no direct fraud or deceit, sufficient to invalidate them in a court of law, yet there may have been some undue and unconscionable advantage taken of the necessities or misfortunes of one of the parties, which a court of equity would not tolerate."

[106]See Complaint, Paragraph XVI, p. 22.

has been exercised in behalf of states suing at law on money demands too often for there to be any question of a discretionary refusal of jurisdiction. *Ohio v. Chattanooga Boiler and Tank Co.*[107] is a recent example of an original action at law which the Court accepted merely as a matter of routine.

When Mr. Chief Justice Hughes speaks of "a burden which the grant of original jurisdiction cannot be regarded as compelling this Court to assume" and of "the need of the exercise of a sound discretion in order to protect this Court from an abuse of the opportunity to resort to its original jurisdiction in the enforcement by States of claims against citizens of other States" he speaks, not of claims traditionally justiciable at law, but of the opportunity thus afforded to States to bring before this Court, as Massachusetts in the case then under consideration attempted, controversies with citizens of other states not traditionally justiciable.

Boundary disputes, for example, are a type of controversy not traditionally justiciable over which the Supreme Court "in the exercise of a sound discretion." has accepted jurisdiction.[108] Claims, on the other hand by states against citizens of other states involving taxes imposed by a state other than that of the forum are similarly unknown to the common law and are not traditionally justiciable. The Supreme Court has already refused jurisdiction to permit suits to enforce tax penalties,[109] and *Massachusetts v. Missouri* merely indicates that the Supreme Court will exercise its discretion in permitting the use of its original juris-

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[107]289 U. S. 439, 53 S. Ct. 663, 77 L. Ed. 1307 (1933).

[108]See *Hans v. Louisiana*, 134 U. S. 1, 10 S. Ct. 504, 33 L. Ed 842 (1901) and particularly 134 U. S. 1, at p. 15.

[109]*Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 8 S. Ct. 1370, 32 L. Ed. 239 (1897).

diction to collect traditionally nonjusticiable interstate tax claims. But to carry this principle over to those types of suits which are traditionally justiciable, and traditionally within the jurisdiction of the Court, would be to place the entire original jurisdiction of the Supreme Court at the discretion—one might almost say at the whim—of the Court, a result not justified by the language of the Constitution and certainly not contemplated by the Founding Fathers. Hamilton, for example in urging the Constitution on the people of New York, had the following to say:

> "The power of determining causes between two States, between one State and the citizens of another, and between the citizens of different States, is perhaps not less essential to the peace of the Union than that which has just been examined. History gives us a horrid picture of the dissentions and private wars which distracted and desolated Germany prior to the institution of the Imperial Chamber by Maximilian, towards the close of the fifteenth century; and informs us, at the same time, of the vast influence of that institution in appeasing the disorders and establishing the tranquility of the empire. This was a court invested with authority to decide finally all differences among the members of the Germanic body.[110]
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> "The Supreme Court is to be invested with original jurisdiction, only "in cases affecting ambassadors, other public ministers, and consuls, and those in which *A STATE* shall be a party' . . . In cases in which a State might happen to be a party, it would ill suit its dignity to be turned over to an inferior tribunal."[111]

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[110] *The Federalist*, # 80.

[111] *Op. cit supra*, # 81 Emphasis *not* added.

Luther Martin, in delivering his "Genuine Information" on the proposed Constitution to the Maryland Legislature, observed:[112]—

> "between a State and citizens of another State . . . Should any question arise between a foreign consul and any of the citizens of the United States, however remote from the seat of empire, it is to be heard before the judiciary of the general government, and in the first instance to be heard in the Supreme Court, however inconvenient to the parties, and however trifling the subject of dispute".

Thus it is apparent that the language in *Massachusetts v. Missouri* relates only to a discretion with relation to the original jurisdiction of the Supreme Court in cases not cognizable at the common law. As to all others, there is vested by the third article of the Constitution a constitutional right in the various States to invoke the original jurisdiction of this Court. This is clearly expressed in *South Dakota v. North Carolina*[113], where the Court said, quoting *Cohens v. Virginia*[114],

> "In the second class, the jurisdiction depends entirely on the character of the parties. In this are comprehended 'controversies between two or more States, between a State and citizens of another State' . . . If these be the parties it is entirely unimportant what may be the subject of the controversy. Be it what it may, these parties have

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[112]III Farrand *"The Records of the Federal Convention"* 170 and 220.

[113]192 U. S. 286, 24 S. Ct. 269, 48 L. Ed. 448 (1903) the quotation appears at 192 U. S. p. 316.

[114]6 Wheat, 264, 406.

a constitutional right to come into the courts of the Union."

The right to invoke the original jurisdiction of the Supreme Court is a valuable and sovereign right of the States which they will not lightly surrender[115]. However, in passing, it may be pointed out that this case does not present any of the conditions set out in the above opinion for the exercies of discretion by the Court. Besides being traditionally within the Court's jurisdiction, the process of this Court is necessary for the State's protection. As pointed out above, the defendants, after plundering the State have dissolved their Louisiana corporation and withdrawn from the jurisdiction, scattering from California to New York and New Jersey. While all except Shushan are presently residing or doing business in New York, there is no assurance that they will remain to be sued. Moreover, the witnesses are as scattered, or more so, than the defendants, and the process of no court other than this can assure a complete trial of the issues involved. Under those circumtances, it is inaccurate to suggest that the courts of New York can afford adequate relief. And certainly it cannot be suggested that Louisiana is, in this proceeding, abusing its privilege of invoking the original jurisdiction of the Supreme Court. Her demand is important, her right clear, and her need great. Certainly, in view of the language of the Constitution and the Founding Fathers, this Court will not permit persons alleged to have plundered a sovereign

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[115]It is important to notice that usually the jurisdiction of international courts extends to cases by nations against the citizens of other nations. See, the Central American Court of Justice, described in de Bustamante, *The World Court* (1926), p. 68. See also the proposed Constitution, Article VI, Section 2, in Streit, *Union Now*, p. 209, and *Union Now with Britan*, p. 221.

State to maintain that, in order to sue "the State of Louisiana can . . . come to New York."[116]

## CONCLUSION

Briefly stated, the State of Louisiana is complaining to this Honorable Court that the defendant foreign corporations and citizens of other states have come into the State of Louisiana and have, through bribery and by the corruption of her public officials, pillaged the public funds of one of her state agencies in which she has a direct, immediate and pecuniary interest, of almost a million dollars. That since that time they have dissolved the domestic corporation which they used as a cloak or a "dummy" behind which to operate in the State of Louisiana, have removed themselves to New York, New Jersey, California and other states, and have placed themselves completely beyond the jurisdiction of the Courts or process of Louisiana. Louisiana insists that, under such circumstances, the Constitution of the United States has, in Article III, Section 2, provided and guaranteed her a forum in which she is entitled to be heard and to press her claims for legal relief. She insists that, not only is she not forced to submit herself to the process of a sister state, but that in no other forum can she obtain the relief that can be afforded in the United States Supreme Court; that the witnesses necessary for the proof of the allegations made in the complaint are located in Louisiana, New York, New Jersey and perhaps in other states, and the process of no single state court, other than the United States Supreme Court, will be sufficient to compel their attendance. Louisiana denies that she can be ousted from her sovereign prerogative of invoking the jurisdiction of the United States Supreme Court merely

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[116]*Cummins Brief*, p. 18.

because one of her citizens was bribed by the other defendants, and participated in the pillage and enjoyed a part of the spoils realized by the non-resident defendants, and insists that the complaint against the non-resident defendants, completely separable from that against the defendant Shushan, be heard, even if it is necessary to drop the defendant Shushan from the proceedings.

The State of Louisiana therefore prays that this Honorable Court dismiss the oppositions to her motion for leave to file the proposed complaint, filed by the defendants herein, and grant the motion heretofore made by Louisiana for leave to file the proposed complaint against said defendants.

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